IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977
NO. 77-1106

JAMES T. O'BRIEN,
PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS (CONTINUED)

REASONS FOR DENYING THE WRIT

A RECALCITRANT WITNESS, WHO IS ORDERED TO TESTIFY BEFORE A STATE INVESTIGATING GRAND JURY, MAY BE SUMMARILY CITED FOR DIRECT CRIMINAL CONTEMPT. NO CONSTITUTIONAL QUESTION IS PRESENTED BY THE USE OF THAT PROCEDURE IN THIS CASE.

PETITIONER, JAMES T. O'BRIEN, SEEKS REVIEW BY THIS COURT OF THE PENNSYLVANIA SUPREME COURT ORDER UPHOLDING HIS SUMMARY CONVICTION FOR DIRECT CRIMINAL CONTEMPT OF COURT.[1] IN HIS FORMULATION OF THIS REQUEST, PETITIONER

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[1] THE DISTINCTION, IN PENNSYLVANIA, BETWEEN DIRECT AND INDIRECT CRIMINAL CONTEMPT IS THAT "A DIRECT CRIMINAL CONTEMPT CONSISTS OF MISCONDUCT OF A PERSON IN THE PRESENCE OF THE COURT, OR SO NEAR THERETO AS TO INTERFERE WITH ITS IMMEDIATE BUSINESS." COMMONWEALTH V. PATTERSON, 452 PA. 457 (1973); SEE ALSO 17 P.S. §§ 2041, 2042, 2047 (ACT OF JUNE 16, 1836, P.L. 784, §§23, 24; ACT OF JUNE 23, 1931, P.L. 925, §1). THE AUTHORITY PERMITTING SUMMARY ADJUDICATIONS, ARISING OUT OF SUCH ACTIONS, IS 17 P.S. §2041 WHICH PROVIDES:

> THE POWER OF THE SEVERAL COURTS OF THIS COMMONWEALTH TO ISSUE ATTACHMENTS AND TO INFLICT SUMMARY PUNISHMENTS FOR CONTEMPTS OF COURT SHALL BE RESTRICTED TO THE FOLLOWING CASES, TO-WIT:
>
> I. TO THE OFFICIAL MISCONDUCT OF THE OFFICERS OF SUCH COURTS RESPECTIVELY;
>
> II. TO DISOBEDIENCE OR NEGLECT BY OFFICERS, PARTIES, JURORS OR WITNESSES OF OR TO THE LAWFUL PROCESS OF THE COURT;
>
> III. TO THE MISBEHAVIOR OF ANY PERSON IN THE PRESENCE OF THE COURT, THEREBY OBSTRUCTING THE ADMINISTRATION OF JUSTICE.

FOOTNOTE CONTINUED ON NEXT PAGE.

ACKNOWLEDGES THAT SUMMARY CONTEMPT PROCEDURES ARE NOT BARRED BY THE CONSTITUTION AND MAY PROPERLY BE EMPLOYED WHERE A DIRECT CONTEMPT POSES A THREAT TO THE ORDERLY ADMINISTRATION OF JUDICIAL PROCEEDINGS. UNITED STATES V. WILSON, 421 U.S. 309 (1975); PETITION AT 6. HE CONTENDS, HOWEVER, THAT THE UTILIZATION OF SUCH A PROCEDURE, IN THE CIRCUMSTANCES OF THIS CASE, VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW. PETITION AT 2, 6.[2]

THE DUE PROCESS DEPRIVATION ASSERTED BY PETITIONER IS SIMPLY THAT HE WAS "AFFORDED FAR LESS PROTECTION" THAN RECALCITRANT WITNESSES IN FEDERAL GRAND JURY PROCEEDINGS. FOR THAT REASON, HE URGES REVIEW BY THIS COURT AND SUBMITS HIS CASE AS A VEHICLE FOR ANNOUNCING PRINCIPLES OF CONSTITUTIONAL IMPORT. PETITION AT 10, 11. BY THAT APPROACH, HE EVIDENCES A MISAPPREHENSION OF BOTH THE IMPORT AND THE BASIS OF THIS COURT'S DECISION IN HARRIS V. UNITED STATES, 382 U.S. 162 (1965).

(FOOTNOTE 1 CONTINUED)
SUMMARY ADJUDICATIONS ARE NOT PERMISSIBLE, HOWEVER, MERELY BECAUSE THE CONTUMACIOUS BEHAVIOR OCCURRED IN THE PRESENCE OF THE COURT. RATHER, THE EXERCISE OF THAT POWER MUST BE NECESSARY "TO AVOID INTERFERENCE WITH THE PRINCIPAL MATTER BEFORE THE COURT." SEE COMMONWEALTH V. AFRICA, 466 PA. 603, 623 (1976).

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IN ASSERTING THIS CLAIM, PETITIONER HAS FAILED TO CONFORM WITH THIS COURT'S RULE 23(F) WHICH DESCRIBES WITH PARTICULARITY THE MATTERS WHICH MUST BE CONTAINED IN THE PETITION TO DEMONSTRATE THAT "THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON WRIT OF CERTIORARI."

PETITIONER'S ARGUMENT IS ERRONEOUSLY PREDICATED ON THE ASSUMPTION THAT HARRIS, SUPRA, WHICH WAS DECIDED BY A CLOSELY DIVIDED COURT, IS A DECISION OF CONSTITUTIONAL DIMENSION. IN THE CONTEXT OF PETITIONER'S CASE, HOWEVER, IT IS IRRELEVANT THAT THIS COURT, IN HARRIS, OVERRULED BROWN V. UNITED STATES, 359 U.S. 41 (1959), AND HELD THAT A WITNESS' REFUSAL TO ANSWER QUESTIONS POSITED BY A GRAND JURY COULD NOT BE DEALT WITH IN A SUMMARY FASHION EVEN IF THE REFUSAL WAS COMMITTED IN THE ACTUAL PRESENCE OF THE SUPERVISING COURT. THAT HOLDING WAS EXCLUSIVELY LIMITED TO, AND CONCERNED WITH, THE SCOPE OF RULE 42(A) AND RULE 42(B) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.[3] HARRIS V. UNITED STATES, SUPRA, AT 164-165, 162-163. IN BOTH HARRIS AND BROWN, SUPRA, THIS COURT WAS CONCERNED SOLELY WITH PROCEDURAL REGULARITY AND WITH ITS RESPONSIBILITY FOR

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[3] RULE 42(A), WHICH ALLOWS SUMMARY DISPOSITION, PROVIDES:

> A CRIMINAL CONTEMPT MAY BE PUNISHED SUMMARILY IF THE JUDGE CERTIFIES THAT HE SAW OR HEARD THE CONDUCT CONSTITUTING THE CONTEMPT AND THAT IT WAS COMMITTED IN THE ACTUAL PRESENCE OF THE COURT. THE ORDER OF CONTEMPT SHALL RECITE THE FACTS AND SHALL BE SIGNED BY THE JUDGE AND ENTERED OF RECORD.

RULE 42(B) PROVIDES THAT A CRIMINAL CONTEMPT, EXCEPT AS PROVIDED IN SUBDIVISION (A) OF THE RULE, SHALL BE PROSECUTED ON NOTICE.

SUPERVISING AND GUIDING THE FEDERAL JUDICIARY.[4] HARRIS V. UNITED STATES, SUPRA, AT 167, DISSENTING OPINION OF STEWART, J. AT 168; BROWN V. UNITED STATES, SUPRA, DISSENTING OPINION OF WARREN, C. J. AT 62.

THIS COURT HAS NEVER HELD THAT SUMMARY CONTEMPT PROCEEDINGS ARE CONSTITUTIONALLY IMPERMISSIBLE. INDEED, IT HAS RECOGNIZED, IN CASES ARISING OUT OF BOTH FEDERAL AND STATE COURTS, THAT SUCH PROCEDURES CAN BE, AND ARE, NECESSARY TO PRESERVE THE FUNCTION AND DIGNITY OF THE COURTS. SEE

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4 PETITIONER'S CLAIM, THAT HARRIS IS, OR SHOULD BE HELD TO BE, OF CONSTITUTIONAL IMPORT (PETITION AT 10-11), IS LARGELY PREDICATED UPON THE DUE PROCESS LANGUAGE OF COOKE V. UNITED STATES, 267 U.S. 517 (1925), WHICH IS QUOTED IN N. 4, AT 166, IN HARRIS. THE QUOTATION IN QUESTION IS NOTHING MORE THAN A STATEMENT OF THE DUE PROCESS REQUIREMENTS FOR THE PROSECUTION OF CONTEMPT, OTHER THAN THAT COMMITTED IN OPEN COURT. THE QUESTION IN HARRIS WAS NOT WHETHER THE REFUSAL TO TESTIFY OCCURRED IN THE ACTUAL PRESENCE OF THE COURT, THEREBY OBVIATING THE NEED FOR THE DETERMINING AUTHORITY TO RELY UPON THE STATEMENTS OF OTHERS FOR ITS KNOWLEDGE OF THE ESSENTIAL ELEMENTS OF THE BEHAVIOR AND THE IDENTITY OF THE ACTOR. SEE IN RE OLIVER, 333 U.S. 257, 275-276 (1948); GROPPI V. LESLIE, 404 U.S. 496, 505 (1972). RATHER, IT WAS WHETHER THIS COURT, IN EXERCISING ITS SUPERVISORY POWERS, AND IN CONSTRUING THE APPLICABLE FEDERAL RULES OF CRIMINAL PROCEDURE, CONSTRUED THE REFUSAL TO TESTIFY AS POSITING SUCH A THREAT TO THE ORDER AND REGULARITY OF THE PROCEEDINGS IN PROGRESS AS TO JUSTIFY ITS INCLUSION WITHIN THE NARROW CATEGORY OF CASES GOVERNED BY FEDERAL RULE OF CRIMINAL PROCEDURE 42(A). HARRIS V. UNITED STATES, SUPRA, AT 165.

GROPPI V. LESLIE, SUPRA, AT 505; TAYLOR V. HAYES, 418 U.S. 488, 499 (1974).[5] THUS, EVEN IF IT IS ASSUMED THAT THIS COURT, AS IT IS PRESENTLY CONSTITUTED, WOULD REAFFIRM HARRIS AND DISALLOW SUMMARY CONTEMPT DISPOSITIONS IN THE FEDERAL GRAND JURY CONTEXT,[6] NO CONSTITUTIONAL QUESTION IS PRESENTED. SINCE THE PROCEDURE ITSELF, WHICH IS HERE AT ISSUE, IS NOT CONSTITUTIONALLY PROHIBITED, THE PROPRIETY OF ITS UTILIZATION WITHIN THE PARTICULAR CONFINES AND CONTEXT OF A STATE GRAND JURY SYSTEM SHOULD, AND MUST, RELY UPON THE EXERCISE OF THE SUPERVISORY POWERS OF THE HIGHEST COURT OF THAT JURISDICTION.

THE QUESTION OF WHETHER CONTUMACIOUS CONDUCT WILL THWART THE FUNCTION AND OPERATION OF THE COURT DEPENDS UPON, AND, THEREFORE, MUST BE EVALUATED WITHIN, THE CONTEXT OF THE COURT PROCEEDING ITSELF. THE MERE FACT THAT THE UTILIZATION OF RULE 42(B) PROCEDURES, IN THE FEDERAL GRAND JURY CONTEXT, HAS GIVEN NO INDICATION OF IMPEDING THE FUNCTIONING OF SUCH GRAND JURIES IS IMMATERIAL. SEE HARRIS V. UNITED STATES,

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5 THE USE OF THE POWER IS, OF COURSE, SUBJECT TO THE LIMITATION THAT THE ELEMENTS OF THE MISCONDUCT WERE OBSERVED BY THE JUDGE. GROPPI V. LESLIE, SUPRA, N. 8 AT 505. BY REASON OF PETITIONER'S OUTRIGHT REFUSAL, IN THE PRESENCE OF THE SUPERVISING JUDGE, TO TESTIFY AND TO PRODUCE THE DOCUMENTS AT ISSUE (R. 196A-197A), SUCH LIMITATION IS INAPPLICABLE TO THE CASE AT BAR.

6 SEE UNITED STATES V. WILSON, SUPRA, CONCURRING OPINION OF BLACKMUN, J. AT 321-322.

SUPRA, N. 5 AT 167. IN THE CASE AT BAR, THE PROCEEDING AT ISSUE WAS A STATE, AND NOT A FEDERAL, GRAND JURY INVESTIGATION. IN CONTRADISTINCTION TO THE FEDERAL SYSTEM, SUCH INVESTIGATION, WITHIN THE COMMONWEALTH OF PENNSYLVANIA, IS ENTIRELY DEPENDENT UPON THE CONVENING OF A SPECIAL INVESTIGATING GRAND JURY WHICH IS JUDICIALLY SUPERVISED FROM ITS INCEPTION, IS STRICTLY REGULATED BY THE SUPERVISING COURT, AND IS, OF NECESSITY, OF LIMITED DURATION. SEE COMMONWEALTH V. MCCLOSKEY, 443 PA. 117, 134, 139 (1971); COMMONWEALTH EX REL. CAMELOT DETECTIVE AGENCY, INC. V. SPECTER, 451 PA. 370 (1973). UNDER ALL OF THESE CIRCUMSTANCES, A SUMMARY CONTEMPT POWER IS ESSENTIAL FOR THE VINDICATION OF THE COURT AND TO INSURE THAT THE COURT'S BUSINESS IS NOT THWARTED. INDEED, WITHOUT SUCH POWER, THE STATE SYSTEM HERE AT ISSUE WOULD BE USELESS.[7]

SO LONG AS THE SUMMARY CONTEMPT POWER IS NOT EXERCISED IN DEROGATION OF THE DUE PROCESS CONSIDERATIONS WHICH HAVE BEEN ARTICULATED BY THIS COURT, NO CONSTITUTIONAL QUESTION IS PRESENTED.[8] WITHIN THE AMBIT OF THOSE CONSIDERATIONS,

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7 IN POINT OF FACT, PETITIONER'S REFUSAL TO COMPLY WITH COURT ORDERS HAS NOW THWARTED TWO SEPARATE GRAND JURY INVESTIGATIONS. SEE IN RE: NOVEMBER, 1975 SPECIAL INVESTIGATING GRAND JURY, OPINION OF ROBERTS, J. AT A16-A18 OF PETITION.

8 THE USE OF THAT POWER, IN THIS CASE, FULLY COMPORTED WITH THOSE CONSIDERATIONS. SEE N. 5 INFRA AT 8.

HOWEVER, IT MUST REMAIN WITHIN THE PURVIEW OF THE STATE COURTS TO DETERMINE WHAT ACTIONS CONSTITUTE SUCH AN IMMEDIATE THREAT TO THEIR INTEGRITY AS TO JUSTIFY THE USE OF THAT POWER.

NEITHER DOES PETITIONER'S ALTERNATE CONTENTION, THAT REVIEW BY THIS COURT IS NECESSARY TO EXPLICATE THE BASIS AND RATIONALE OF VARIOUS CIRCUIT COURT DECISIONS, ARISING IN THE FEDERAL CONTEXT, PROVIDE ANY BASIS FOR THE ISSUANCE OF THE WRIT REQUESTED. SEE PETITION AT 9-11.[9] EVEN IF IT WERE TO BE ASSUMED THAT CLARIFICATION AS TO THE BASIS OF THOSE DECISIONS IS DESIRABLE OR NECESSARY, A STATE-BASED CASE, WHICH PRESENTS NO CONSTITUTIONAL QUESTION, IS NOT THE APPROPRIATE VEHICLE. WHERE THE REVIEW OF THE JUDGMENT OF A STATE COURT IS SOUGHT, THE GRANT OF CERTIORARI IS DEPENDENT UPON THE EXISTENCE OF A FEDERAL CONSTITUTIONAL QUESTION. NO SUCH QUESTION IS PRESENTED BY THIS CASE.

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9 SPECIFICALLY, PETITIONER SUGGESTS THAT A "DIMENSION OF CONFUSION" EXISTS BECAUSE UNITED STATES V. ALTER, 482 F.2D 1016 (9TH CIR. 1973), CITED HARRIS, SUPRA, "AS HAVING CONSTITUTIONAL FORCE", WHILE IN RE SADIN, 509 F.2D 1252 (2ND CIR. 1975), AND IN RE GRAND JURY INVESTIGATION (BRUNO), 545 F.2D 385 (3RD CIR. 1976), "SPOKE STRICTLY IN TERMS OF FEDERAL STATUTES AND RULES, AVOIDING CITATION OF CONSTITUTIONAL PROTECTIONS." PETITION AT 8-10. HOWEVER, SINCE HARRIS, SUPRA, IS CLEARLY NOT A CONSTITUTIONALLY-BASED DECISION, EVEN IF IT WERE SO CONSTRUED BY THE 9TH CIRCUIT IN ALTER (WHICH RESPONDENT CONTESTS), THAT CONSTRUCTION IS IRRELEVANT TO THE DISPOSITION OF PETITIONER'S REQUEST FOR REVIEW.

CONCLUSION

FOR THE FOREGOING REASONS, RESPONDENT, THE COMMONWEALTH OF PENNSYLVANIA, RESPECTFULLY REQUESTS THAT THE COURT NOT ISSUE A WRIT OF CERTIORARI TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

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JAMES T. O'BRIEN, : OCTOBER TERM, 1977
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V. :

COMMONWEALTH OF PENNSYLVANIA, : No. 1106
RESPONDENT

CERTIFICATION OF SERVICE

I, GAELE McLAUGHLIN BARTHOLD, ESQUIRE, COUNSEL FOR RESPONDENT, COMMONWEALTH OF PENNSYLVANIA, HEREBY CERTIFY THAT I HAVE CAUSED A COPY OF THIS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO BE SERVED UPON HOWARD GITTIS, ESQUIRE, COUNSEL FOR PETITIONER, JAMES T. O'BRIEN, BY DEPOSITING THREE COPIES IN THE UNITED STATES MAIL, FIRST CLASS, POSTAGE PREPAID, ADDRESSED TO HOWARD GITTIS, ESQUIRE, TWELFTH FLOOR, PACKARD BUILDING, PHILADELPHIA, PENNSYLVANIA, 19102, ON WEDNESDAY, APRIL 26, 1978.

Gaele McLaughlin Barthold

GAELE McLAUGHLIN BARTHOLD